FILE COPY

Supreme Court, U.S.
FILED
AUG 31 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 71-1536

CENTRAL GULF STEAMSHIP CORPORATION,
Petitioner,

versus

GABRIELLE JOAN DENNIS, Individually and in the Alternative, ANNA MAE DENNIS MALET, widow of M. MALET, Petitioner, and/or Curator of the Interdict, GABRIELLE JOAN DENNIS,
Respondent.

RESPONSIVE BRIEF ON BEHALF OF RESPONDENT, GABRIELLE JOAN DENNIS, TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED BY CENTRAL GULF STEAMSHIP CORPORATION

Harold J. Lamy of
DODD, HIRSCH, BARKER, MEUNIER, BOUDREAUX & LAMY
711 Carondelet Building
New Orleans, Louisiana 70130
Counsel for Respondent, Gabrielle Joan Dennis

I N D E X

	Page
Citation to Opinions Below ----------	1
Argument ----------	2
Conclusion ----------	10
Certificate of Service ----------	11

TABLE OF AUTHORITIES

Cases:

Dennis v. Central Gulf Steamship Corp., 232 F Supp. 943 (E.D.La.1971) 453 F 2d 137 (5th Cir. 1972)----------	6
Dugas v. National Aircraft Corp., 438 F 2d 1386 (3rd Cir. 1971) --------	3
In Re Farrell Line, Inc., 339 F Supp. 91 (E.D.La., 1971) ----------	6
The Harrisburg, 119 U.S. 199 (1886) --	4,9, 10
Marsh v. Buckeye Steamship Co., 330 F Supp.972 (N.D.Ohio 1971) -------	5,6
Moragne v. States Marine Lines, 398 U.S. 375 ----------	1,4, 9,10
U. S. Steel Corp. 436 F 2d 125 (6th Cir. 1970) ----------	6
Ward v. Union Barge Line, 443 F 2d 563 (3rd Cir. 1971) ----------	4,6

Page

Statutes:

Jones Act 46 U.S.C. 688 ---------- 3

Other Authorities:

Las Siete Partidas 7:9 11,21 & 23 ---- 8

Nicholas, Roman Law, 210 Oxford: 1962 ---------- 7,8

Radin, Handbook of Roman Law (West: 1927) § 47 ---------- 6

Voss, The Recovery of Damages of Wrongful Death at Common Law, at Civil Law and in Louisiana 6 Tulane Law Review, 201, 216 ---------- 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

NO. _____

CENTRAL GULF STEAMSHIP CORPORATION,

Petitioner,

versus

GABRIELLE JOAN DENNIS, Individually and in the Alternative, ANNA MAE DENNIS MALET, widow of M. MALET, Petitioner, and/or Curator of the Interdict, GABRIELLE JOAN DENNIS,

Respondent.

RESPONSIVE BRIEF ON BEHALF OF RESPONDENT, GABRIELLE JOAN DENNIS, TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED BY CENTRAL GULF STEAMSHIP CORPORATION

THE ISSUE PRESENTED TO THE COURT

The issue presented to the Court by the petition for writ of certiorari filed by Central Gulf Steamship Corporation is whether or not this Court in deciding Moragne v. State Marine Lines, 398 U.S. 375, provided for a survival of tort remedy as well as a

remedy for wrongful death under maritime law. In this context, by survival of tort remedy is meant a remedy for those damages sustained by the decedent before his death and inherited by his heirs, and in the case of wrongful death is meant those damages sustained directly by the heirs as the result of the death of the decedent.

The Fifth Circuit in affirming the district court opinion in this case found that the damages awarded to the plaintiff under the survival of tort remedy, namely, for the decedent's pain and suffering, his lost wages to date of death and the funeral expenses are almost universally awarded under state death statutes, and are also awarded under the Jones Act except for funeral expenses. The issue of whether or not the heirs in a maritime death action can recover for non-pecuniary items, such as loss of consortium, loss of love and affection or "survivors' grief" are elements of damage under a wrongful death recovery. These items of damage were not germane to this case and were not awarded by either the district court or the court of appeals.

These very real damages which harken for recognition will have to await another case for consideration.

The survival of tort remedy has both an historical and statutory legal basis and fulfills a compelling realistic need under modern maritime jurisprudence. Petitioner attempts to create a problem and conflict among the circuit courts of appeal when in fact there are none concerning the elements of damages awarded in this case. Petitioner contends that under the maritime law damages for wrongful death should be based on the

survivor's loss alone and cites as his basis for this the provisions of the Death on the High Seas Act. However, this would discriminate against the survivors of non-seamen and create a disparity among beneficiaries since under the Jones Act, 46 U.S.C., § 688, that statute provides for both wrongful death and survival of tort remedies for the heirs of seamen. In addition, historically, where the Death on the High Seas Act provided for the wrongful death recovery, the courts have used the appropriate state wrongful death statute for providing survival of tort damages. See Dugas v. National Aircraft Corp., 438 F 2d 1386 (3rd Cir. 1971). In discussing the Death on the High Seas Act, this Court clearly indicated that that Act was not a limiting one but rather an expanding one. It did not take away any benefits. It only extended the benefits in light of "The Harrisburg". In this connection, the Court said:

> ". . .To put it another way, the message of the Act is that it does not by its own force abrogate available state remedies; no intention appears that the Act have the effect of foreclosing any non-statutory federal remedies that might be found appropriate to effectuate the policies of general maritime law. . ." (26 L.Ed. 2d at 356)

Furthermore in an injury case recovery may be had for such things as pain and suffering, loss of wages and medical expenses. As the Fifth Circuit said in this case:

> "The maritime law permits an injured party to recover damages for his pain and suffering. Heredia v.

> Davies, 4th Cir., 1926, 12 F 2d 500, 501; Vastano v. Partownership Brovigtank, E.D.N.Y., 1957, 158 F. Supp., 477,480. Moragne explained that, 'our decision does not require the fashioning of a whole new body of federal law, but merely removes a bar to access to the existing general maritime law. In most respects the law applied in personal injury cases will answer all questions that arise in death cases'. In applying this formula we find damages for pain and suffering appropriate here. Recovery for this element of damage was properly permitted by the district court under the general maritime law."

The argument of the petitioner in this case to deny survival of tort recovery to respondent would create a disparity and lack of uniformity among claimants in maritime law - the very thing that petitioner submits should be avoided.

The historical basis and compelling logic that led this Court to overrule The Harrisburg and conclude that there is a wrongful death action in American Maritime law applies equally as well to a survival of tort remedy.

In Ward v. Union Barge Line, 443 F 2d 563 (3rd Cir. 1971), the Third Circuit Court of Appeals made this observation concerning the Moragne decision and the survival of tort recovery as follows:

> "Last term the United States Supreme Court overruled The Harrisburg

> in Moragne v. States Marine Lines, 398 U.S. 375, 90 S.Ct. 1772, 26 L. Ed. 2d 339 (1970), squarely holding that 'an action does lie under general maritime law for death caused by violation of maritime duties'. 398 U.S. at 409, 90 S. Ct. at 1792. Although Justice Harlan's opinion primarily discusses the existence of a wrongful death action, the petitioner there had sought damages for pain and suffering as well as for wrongful death, and the opinion should erase any doubt concerning the survival of actions under the general maritime law."

In Marsh v. Buckeye Steamship Co. 330 F.Supp. 972, Chief Judge Battisti of the District Court of the Northern District of Ohio, stated on page 974 of his decision as follows:

> "Additionally, there is nothing that the defendants point out to us or that the Supreme Court says either impliedly or expressly to indicate that the survival rules may not be determined in accordance with applicable state rules or even that it might not be included in a court fashioned general maritime rule. . . it is only a small leap from the decision in Moragne to an acceptance of survival of personal injury actions as an integral part of the general maritime law."

Every case that has been decided since Moragne involving a maritime death has

provided for a survival of tort remedy. See Ward v. Union Barge Line Corp., 443 F 2d 563 (3rd Cir. 1971); Dennis v. Central Gulf Steamship Corp., 323 F Supp. 943 (E.D.La. 1971), affirmed 453 F 2d 137 (5th Cir. 1972); Marsh v. Buckeye Steamship Co., 330 F Supp. 972 (N.D. Ohio 1971); In Re Sincere Navigation Corp., 329 F. Supp. 652 (E.D.La. 1971); In Re Farrell Line, Inc. 339 F. Supp. 91 (E.D. La. 1971); United States Steel Corp. v. Lamp, 436 F 2d 1256 (6th Cir. 1970).

The petitioner makes reference to the civil law as distinguished from the common law to support its argument that damages sustained by the decedent should not survive to his heirs. It cites at page 8 of its brief several French writers as well as quotes from the Spanish law, Las Siete Partidas. It is submitted that the petitioner has misinterpreted the French and Spanish authorities or, at least those authorities are susceptible of a contrary interpretation. Pothier's own citation reveals that he is discussing the particular Roman delict (i.e. tort), known as injuria. Like early English law, early Roman tort law was primarily penal in nature. One of the nominate torts recognizing the laws of the Twelve Tables was that of injuriae. Injuria meant injury in the sense of offense to one's dignity, honor, etc. The law of the Twelve Tables provided that the plaintiff would be entitled to retribution in kind, lex talonis. Although this was obsolete by the time of Gaius, the harshness of the penal remedy resulted in the creation of an exception to the general rule of Roman law of survival actions in favor of the heirs of the decedent. This is set out by the following authorities:

Radin, Handbook of Roman Law (West:

1927) § 47, speaking of the actio furti (action for theft), "like all delictual actions, it survived the injured person, but not the wrongdoer." (emphasis added).

Id., § 48, p. 143, speaking of injuriae:

> "Another special point to notice in this action was the fact that it died completely with the person of either victim or wrongdoer, differing in this respect from other tort actions. . . If, however, litis contestatio had already been reached, that, as we remember, worked a procedural novation." (Emphasis added)

Nicholas, Roman Law, 210 (Oxford: 1962):

> "If the wrongdoer died before the [delictual] action was brought, it would not lie against his heir: the victim could claim to revenge himself only on the wrongdoer. (In the language of the civilians, the action was 'passively intransmissible.') On the other hand, if it was the victim who died, the action normally did lie (it was 'actively transmissible', but an exception was made in the case of the action for injuria, because of its peculiary vengeful character." (emphasis added)."

The general civil law of delict, unlike the exception discussed by Pothier and cited by petitioner, is derived from the Roman Lex Aquilia, which created a more general tort separate and distinct from the injuria, known as the damnum injuria datum, or the harm which gives rise to damage. Unlike the

exceptional tort injuria, the Aquilian action, as generalized in the course of Roman legal history, was mainly compensatory, rather than punitive (although it did provide that a defendant who refused to repair the injury he did to another before judgment had to pay double damages). Because of its nature this action, which became the generalized basis for a tort action at civil law, created a right that vested in the injured immediately upon suffering the harm. As a right of the injured, it formed a part of his patrimony as fully as any other right, and was fully inheritable by his heirs. (For the total separateness of the damnum injuria datum from the injuria, see Radin, pp. 144-148, § 49, Nichols, p. 218, Sohm, Institutes of Roman Law (Ledlie translation: 1901) § 85, pp. 434-438. For the derivation of the civil law of torts from the damnum injuria datum see Radin, § 51, pp. 151-152.)

It appears that the Spanish law cited, that of the laws of Las Siete Partidas 7:9: 11, 21 & 23, like Pothier, refer only to the exception to the rule and not to the general rule. This is evident from the importance given the joining of the suit (litis contestatio) in both Pothier and the Partidas. Moreover, one author has generalized upon the very provisions of the Partidas to reach a conclusion directly contrary to what the petitioner urges. See Voss, The Recovery of Damages of Wrongful Death at Common Law, at Civil Law and in Louisiana 6 Tulane Law Review, 201, 216.

In summary, it seems clear that Pothier was not stating that all tort actions abated upon death of the injured. He was speaking of one particular nominate tort grounded upon any intentional offense to one's dignity, the

tort of injuria. This exception to the general law in no way detracts from the general rule of civil law that the actions of a decedent passed to his heirs.

Recovery for the decedent's pain and suffering and the funeral expenses incurred by his death, resulting from the negligence of a tort feasor, were generally recoverable under state law and maritime law prior to the Harrisburg. The authorities for this statement are set out in the citations in the opinion of the district court as affirmed by the Fifth Circuit Court of Appeals in this case. As the Fifth Circuit said in its opinion in this case:

> "As Moragne teaches, it would be anomalous for us to take away a pre-Moragne remedy which was almost universally available by the application of state survival statutes when there is no federal maritime policy against such recovery. '. . . Certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.' (The Sea Gull, 21 F. Cas. 909, 910 (No. 12,578) (C.D. Md. 1865).) Moragne at 387."

As this Court pointed out in its Moragne decision, the Harrisburg was wrong in interpreting federal maritime law as negating an action for wrongful death. When expounding on the elements of damage under the Moragne death action, a court is certainly not restricted by the Death on the High Seas Act or any other statute that may have been

passed subsequent to the Harrisburg decision. In all probability had not the Harrisburg been decided, there would have been no need for the statutes on wrongful death and survival actions that have been passed since that decision. In fashioning the remedies for wrongful death and survival of tort actions under maritime law, this Court in its Moragne decision stated as follows:

> "If still other subsidiary issues should require resolution, such as particular questions of the measure of damages, the courts will not be without persuasive analogy for guidance. Both the Death on the High Seas Act and the numerous state wrongful-death acts have been implemented with success for decades. The experience thus built up counsels that a suit for wrongful death raises no problems unlike those that have long been grist for the judicial mill." 398 U.S. 375 at page 408.

This Court had earlier stated in its Moragne opinion that:

> "In most respects the law applied in personal injury cases will answer all questions that arise in death cases." 398 U.S. 375 at p. 405.

In conclusion, it is submitted that the Moragne decision of this Court provides for the survival of tort damages awarded in this case, and the opinion of the Fifth Circuit in this case should be affirmed. As Judge Rubin in quoting Chief Judge John Brown

said in his district court opinion. "The Admiralty has led, not followed."

Submitted,

Harold J. Lamy of
DODD, HIRSCH, BARKER, MEUNIER,
BOUDREAUX & LAMY
711 Carondelet Building
New Orleans, Louisiana 70130
Counsel for Respondent,
Gabrielle Joan Dennis

C E R T I F I C A T E

I hereby certify that a copy of the above and foregoing responsive brief has been forwarded to Mr. Robert B. Acomb, Jr. of Jones, Walker, Waechter, Poitevent, Carrere & Denegre, 28th Floor, 225 Baronne Street, New Orleans, Louisiana 70112, attorneys for petitioner, Central Gulf Steamship Corporation, by U. S. mail, postage prepaid.

New Orleans, Louisiana, this 30th day of August, 1972.

Harold J. Lamy